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Supreme Court, U.S.
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No. 96-586

In The

Supreme Court of the United States

October Term, 1996

ARIZONA CENTRAL RAILROAD,

Petitioner,

v.

STATE OF ARIZONA; ARIZONA DEPARTMENT OF REVENUE; CITY OF PHOENIX; AND TOWN OF CLIFTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Respondents may grant exemptions from generally applicable sales and use taxes imposed uniformly upon railroads and more than 146,000 other commercial and industrial taxpayers, without subjecting such taxation of railroads to challenge under 49 U.S.C. § 11503(b)(4).

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, the State of Arizona, the Arizona Department of Revenue, the City of Phoenix, and the Town of Clifton (collectively, the "Taxing Authorities"), respectfully request that this Court deny Arizona Central Railroad's Petition for a Writ of Certiorari seeking review of the court of appeals' decision in this case.

STATEMENT OF THE CASE

This tax case concerns an issue of statutory construction that this Court recently resolved and that the circuit courts of appeals have applied consistently.

The sole Petitioner, Arizona Central Railroad, operates a railroad exclusively in Arizona.[1] Its operations focus primarily on providing entertainment rides in Arizona's scenic Verde Valley, although Petitioner also transports some freight along its short route. Petitioner, like more than 146,000 other Arizona businesses, is obligated to pay sales and use taxes. Petitioner objects to paying taxes on its freight income, asserting that Arizona's sales and use tax system discriminates against railroads in violation of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503 ("4-R Act").

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[1] The other Plaintiffs/Appellees below, Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") and Southern Pacific Transportation Company ("Southern Pacific"), did not file a Petition for Certiorari, and they did not join in the Petition for Certiorari filed by Arizona Central.

The Ninth Circuit Court of Appeals, consistent with decisions by the Seventh, Eighth, and Tenth Circuit Courts of Appeals, correctly applied this Court's decision in *Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994), that a State may grant exemptions from a generally applicable tax without subjecting the taxation of railroads to challenge under the relevant provision of the 4-R Act, 49 U.S.C. § 11503(b)(4). The rule in *ACF* establishes that the proper comparison class for determining violations of 49 U.S.C. § 11503(b)(4) is "all other commercial and industrial taxpayers subject to taxes" and not just a railroad's competitors. In applying this rule, the Ninth Circuit determined that Arizona's sales and use tax system does not violate the 4-R Act because railroads pay under the same system of sales and use tax applied to more than 146,000 other Arizona businesses.

The Ninth Circuit applied the *ACF* decision properly. No conflict exists between the circuits. The three pre-*ACF* decisions that Petitioner cites to propose an alternative test are based on false reasoning. In short, no compelling reason exists for this Court to grant the petition.

A. Procedural History.

The procedural history outlined by Petitioner is incomplete. The case began in 1993 when Santa Fe and Southern Pacific – after two unsuccessful state administrative appeals – filed suit seeking a declaration that the Taxing Authorities' sales and use taxes violated federal law and requesting an injunction against the collection of such taxes. Santa Fe and Southern Pacific moved for a preliminary injunction to halt collection of the challenged

taxes during the pendency of the litigation. (Item of Record ("IR") 5.) The court denied the requested preliminary injunction, finding that the railroads had not established "reasonable cause" for the court to believe that a violation of the law was occurring or was about to occur. (IR 37.) The court applied the test in *Kansas City Southern Railway Company v. McNamara*, 817 F.2d 368 (5th Cir. 1987), that discrimination against railroads occurs when a tax is applied to railroads alone or to railroads as part of a narrow class of taxpayers. The court specifically rejected the railroads' argument that a tax is discriminatory if it is applied to the railroads but not to their competitors. (IR 37.) The Taxing Authorities then moved for summary judgment against the railroads. (IR 43.) At this point in the litigation, Petitioner moved to intervene.[2]

In the summary judgment proceedings, the Taxing Authorities furnished the district court with a plethora of statistical information relating to the taxes that they collected in an effort to demonstrate, consistent with *McNamara*, that they impose the taxes at issue upon a broad class of industrial and commercial entities. (IR 43.) The railroads responded by reiterating their assertion concerning discrimination based upon competitive disadvantage. (IR 61.) The district court – without explanation –

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[2] From its intervention in 1993 until the filing of its improper Petition for Certiorari in August 1996 (which the Clerk of this Court returned due to non-compliance with the Court's rules), Petitioner did not initiate anything substantive in this litigation, choosing instead to simply join the pleadings that Santa Fe and Southern Pacific filed.

changed the test that it had used in denying the preliminary injunction and adopted the railroads' competitive disadvantage test that no circuit court had applied. The district court then concluded that the taxes at issue were discriminatory solely because they applied to the railroads and not to their competitors. (IR 85.)

The Taxing Authorities appealed to the Ninth Circuit Court of Appeals, which applied this Court's decision in *ACF* that discrimination would occur only if railroads were taxed as part of an isolated group rather than under taxes that were generally applicable to a large number of taxpayers. The Ninth Circuit determined that the railroads had not been singled out for taxation and that the railroads' placement in a class of more than 146,000 other taxpayers constituted a sufficiently large group to make the sales and use taxes in question generally applicable and thus non-discriminatory. This approach, the court reasoned, would effectuate the congressional purpose of insuring railroads "equal [tax] treatment with other taxpayers." Pet. App. at 10.

B. Factual Background.

Arizona, like most States, relies on three principal taxes to fund government operations. It imposes a property tax, an income tax (both individual and corporate), and a sales tax (technically referred to as the transaction privilege tax). Ariz. Rev. Stat. Ann. ("A.R.S.") §§ 42-201, 43-1001, 43-1101, and 42-1301. Like most States, Arizona also has enacted a use tax that complements the sales tax. *See* A.R.S. § 42-1401.

The State sales tax is imposed at a rate of five percent on the sale of a number of goods and services occurring in Arizona. A.R.S. § 42-1317(A)(1).[3] The use tax also imposes a five percent levy, but on the purchase price of goods bought outside Arizona and later brought into the State for use, storage, or consumption. A.R.S. § 42-1408(A). Although the sales and use taxes are separate taxes, only one can be applied to a transaction. A.R.S. § 42-1409(A)(1).

The sales tax applies to eighteen classes of industrial and commercial entities.[4] To conduct business lawfully in Arizona, an entity must obtain a sales tax license. A.R.S.

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[3] The sales tax is a tax on the privilege of doing business and is "measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as prescribed by [statute]." A.R.S. § 42-1306(A). Certain items are exempt from the sales tax, such as prescription medicine (A.R.S. § 42-1310.01(A)(8)) and food (A.R.S. § 42-1310.01(A)(15)).

[4] The eighteen classifications include retail sales, **transporting**, utilities, telecommunications, publication, job printing, pipelines, private car lines, commercial lease, transient lodging, personal property rental, mining, amusement, restaurant, animal feed, prime contracting, owner builder sales, and membership camping. A.R.S. § 42-1310.01-.18. (The court of appeals referred to "seventeen" classifications because it omitted the animal feed classification in its decision. *See* Pet. App. at 5.) The "**transporting**" classification of A.R.S. § 42-1310.02 includes railroads and the operators of ambulances, limousines, buslines, delivery services, moving and van lines, air freight services, shuttles, messenger services, trucking services, waste disposal services, towing and wrecking services distributors, and hearses. (IR 44 at 5.)

§ 42-1305.[5] Through the issuance of sales tax licenses, the Taxing Authorities monitor the number of active entities that are subject to the tax. For fiscal year 1991-1992, Arizona issued 146,981 sales tax licenses, the City of Phoenix issued 41,392, and the Town of Clifton issued ninety-six. (IR 44.)

Arizona collected $1,941,866,013 in sales and use taxes for the fiscal year ended July 30, 1992. (*Id.*) Santa Fe and Southern Pacific – by any objective measure the two largest railroads in Arizona (IR 1) – pay approximately $600,000 per year in sales taxes. (IR 44.) Railroads operating in Arizona pay only a minimal amount of use tax to the Taxing Authorities.

Because Petitioner did not intervene in the action below until after the original parties had conducted discovery and had begun the process of moving for summary judgment, the record contains little information regarding the amount of taxes that Petitioner has paid. Arizona has audited Petitioner's business and has determined that over a four-year period, Petitioner paid about $50,000 per year in sales taxes, the bulk of which was reported in the amusement classification for receipts from its recreational train rides. Thus, contrary to the Petition's general theme, most of Petitioner's Arizona business activity has nothing to do with competing with motor carriers for freight.

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[5] Almost all Arizona cities and towns have adopted the Model City Tax Code, which imposes a sales tax on virtually the same business activities as the State sales tax, including transportation. Model City Tax Code § 475(d)(1).

Motor carriers, in addition to paying other taxes and fees,[6] are subject to an in-lieu tax called the Motor Carrier Tax. A.R.S. §§ 28-1599 to -1599.46. This tax is calculated based on the distance that a motor carrier has traveled within Arizona and imposed at rates that increase with vehicle weight. A.R.S. § 28-1599.05. Motor carriers also pay a use fuel tax of eighteen cents per gallon. A.R.S. § 28-1501. By comparison, the railroads pay a use tax of only three cents per gallon for the same fuel. (IR 28 at 15.)

Even though Arizona is not constitutionally required to do so, the State limits its sales tax under the transporting classification to intrastate activities only. *See* A.R.S. § 42-1310.02(A) (providing that the tax applies to transporting "from one point to another point in this state"). Thus, railroads do not pay any sales taxes on their interstate operations. By contrast, the taxes that motor carriers pay on the distance that they travel are not similarly limited. The Motor Carrier Tax is imposed on the motor carrier *irrespective* of whether the carrier's journey is in inter- or intra-state commerce.

The Petition's "Factual Background" contains several insufficient, unsupported, or simply argumentative statements. For example, Petitioner alleges that the sales tax is imposed on "the business of transporting for hire persons, freight or property by . . . railroad." Pet. at 1. While this statement is reflective of the wording of the statute, it neglects to inform the reader that less than one percent of

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[6] Motor carriers pay a gross weight fee (A.R.S. § 28-206), plus an Additional Highway Use Tax. A.R.S. § 28-226.

all revenues that the railroads generate by operations within Arizona are subject to the sales tax.[7]

Additionally, Petitioner asserts without citation that "heavy commercial trucks have historically paid to the state less than the full cost of highway maintenance and construction resulting from the motor carriers' use of the roads." Pet. at 2. This alleged fact presumably is based upon a highway study done to measure the imposition of wear and tear upon the state roadway system. Petitioner fails to disclose that the report highlighted that while no group of users pays for all of the wear and tear associated with its use of the roadways, motor carriers pay the most by far. (IR 79 at 4-5.) In any event, the findings in the report are not conclusive by any means.

Petitioner also alleges without citation that "[i]n comparing the cost of shipping goods, shippers of freight must include in their comparison the transaction privilege tax if they ship by rail, but not if they ship by motor carrier." Pet. at 2. This alleged "fact" apparently is

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[7] Indeed, the railroads, unlike most other businesses that pay sales tax, enjoy a special set of statutory tax exemptions that specifically exclude certain of their purchases and activities from taxation. For example, Santa Fe has admitted that 99.17 percent of all revenues that it obtained from trains traveling within Arizona are not subject to the sales tax on transporting because those trains are engaged in interstate commerce. (IR 28 at 12.) Further, Southern Pacific purchased $66,078,001 and $73,110,532 in rolling stock, rails, ties and signal control equipment for calendar years 1990 and 1991, respectively, which it intended to use within Arizona. (IR 28 at 7.) These purchases were exempt from both the sales and the use taxes. A.R.S. §§ 42-1310.01(B)(8), 42-1409(B)(8).

derived from a railroad employee's affidavit that contains improper legal conclusions.

REASONS TO DENY THE PETITION

No compelling reason exists for this Court to review the Ninth Circuit's opinion. First, no novel federal question exists because the Ninth Circuit simply and squarely applied this Court's holding in *Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994), to the facts of this case. Second, no conflict exists among the circuits because the three other circuits that have addressed challenges to state taxing statutes under 49 U.S.C. § 11503(b)(4) after *ACF* – the Seventh, Eighth, and Tenth Circuits – have applied the same analysis as the Ninth Circuit did. Third, the alleged conflict among other lower courts does not exist because the cases on which Petitioner relies were all decided before – and are irreconcilable with – this Court's decision in *ACF*, and, in any event, the Petitioner's proffered "competitive disadvantage" test is analytically unsound.

1. The Court of Appeals Correctly Applied This Court's Holding in *Department of Revenue v. ACF Industries, Inc.*

The Ninth Circuit properly applied this Court's holding in *ACF* that

> a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection (b)(4).

Pet. App. at 11 (quoting *ACF*, 114 S. Ct. at 848).

In *ACF*, this Court analyzed a challenge under 49 U.S.C. § 11503(b)(4) to Oregon's imposition of personal property tax on railroads. The Court meticulously examined the statutory framework within which subsection (b)(4) is found and concluded that it was Congress' desire, as expressed in the literal language of the statute, to allow States to enact exemptions from general taxation schemes as long as the tax that they imposed remained one of "general applicability."

The Court gave three reasons why a State could grant exemptions from generally applicable taxes without subjecting its taxation of railroads to challenge under subsection (b)(4). First, the Court recognized that railroads cannot challenge property tax exemptions under subsections (b)(1)-(3) because exempt property is not part of the comparison class against which discrimination is measured under those subsections. The Court explained that "[i]t would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)." 114 S. Ct. at 849. The Ninth Circuit cited this analysis as its initial reason for rejecting the railroads' discriminatory exemption argument. *See* Pet. App. at 11 ("First, the discriminatory exemption argument fails because the Supreme Court in *ACF* held that discrimination under the 4-R Act does not arise when exemptions are granted from a generally applicable property tax if the railroads are treated fairly in comparison to other industrial and commercial taxpayers subject to the tax.").

The second reason this Court gave in *ACF* to "reinforce [its] construction of the statute" was that Congress

had not spoken with any degree of particularity to the relationship between tax exemptions and subsection (b)(4), and the Court was "confident that [Congress] would have spoken with clarity and precision" if it had intended to restrict state power in this regard. 114 S. Ct. at 850. In applying that analysis, the Ninth Circuit again used nearly identical language: "Accordingly, if Congress, as a condition of permitting state taxation of the railroads through sales and use taxes had intended to restrict state power to exempt other types of businesses from these taxes, Congress would have done so explicitly." Pet. App. at 12.

Finally, in reviewing the other three subsections of § 11503(b), this Court determined that Congress meant to find that discrimination existed when the railroads were treated differently than most, not all, other commercial and industrial businesses. The Court concluded that as long as the railroads were not "either alone or as part of some isolated and targeted group . . . the only commercial entities subject to an ad valorem property tax," the tax should be sustained. *ACF*, 114 S. Ct. at 851. The Ninth Circuit, applying this reason, found no discrimination. *See* Pet. App. at 14.

This Court has provided a bright-line test. The Ninth Circuit applied that test and determined that the Taxing Authorities' sales and use taxes were taxes of general applicability that did not place the railroads in an isolated and targeted group of taxpayers. The court of appeals correctly found that Arizona's taxation scheme effectuated Congress' intent of insuring that railroads are "accorded equal tax treatment with other taxpayers"

because the railroads pay the same sales and use taxes as 146,000 other businesses in Arizona. Pet. App. at 10.

2. No Conflict Exists Between the Decision Below and the Decisions of All the Other Circuit Courts That Have Addressed This Issue.

The Seventh, Eighth, and Tenth Circuit Courts of Appeal have applied the rule that this Court enunciated in *ACF* in the same manner as the Ninth Circuit did to resolve challenges under subsection (b)(4). *See Burlington N. R.R. v. Wisconsin Dep't of Revenue*, 59 F.3d 55 (7th Cir. 1995); *Burlington N. R.R. v. Bair*, 60 F.3d 410 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 914 (1996) ("*Bair*"); *Burlington N. R.R. v. Huddleston*, 94 F.3d 1413 (10th Cir. 1996). Importantly, while the circuit courts have all applied this Court's rule consistently, the different facts presented in those cases have produced different ultimate results, thus proving that this Court developed a reasonable and workable test.

In *Wisconsin Department of Revenue*, the Seventh Circuit upheld Wisconsin's personal property tax scheme. The parties had stipulated that over eighty percent of the personal property possibly subject to taxation in Wisconsin was exempted by law. The court observed that the "Supreme Court held [in *ACF*] that a state's exemptions of various classes of non-railroad property from a generally applicable *ad valorem* property tax are not cognizable" under subsection (b)(4). 59 F.3d at 55-56. The court then held that "[t]he railroads can only succeed by showing that the actual tax levied is a general tax in name only and is in fact a tax on railroads. The only number relevant

to that inquiry is the percentage of the total tax levy that falls on railroads." *Id.* at 58. Here, as in the Seventh Circuit case, the railroads pay an incredibly insignificant amount of the over $1.9 billion in sales and use tax collected annually by the Taxing Authorities.

In *Bair*, the Eighth Circuit struck down an Iowa law that provided for the imposition of a personal property tax upon railroads and other select taxpayers. The court observed that Iowa itself does not have a general personal property tax; rather, the personal property of the railroads and certain utilities are included in the valuation of real property and assessed at real property rates. The court held that the tax was not "generally applicable" because Iowa did not have a tax from which it granted exemptions, only a tax that had "singled out for taxation all the personal property of railroads and a handful of interstate utilities, while leaving untaxed most of the personal property of every kind." 60 F.3d at 413. The court recognized the bright line "general applicability" test derived from *ACF* as the Seventh Circuit had. The Ninth Circuit applied the same test here and concluded that the Taxing Authorities' sales and use taxes were taxes of general applicability that applied to over 146,000 state taxpayers.

In *Huddleston*, the Tenth Circuit struck down a Colorado statute that provided for taxation of personal property, but exempted intangible personal property. The exemption, however, did not extend to railroads or certain other public utilities. The court held that the tax was not "generally applicable" because the "tax exemption applie[d] to *all* commercial and industrial taxpayers other

than 'public utilities.' " 94 F.3d at 1417 (emphasis in original). The court noted that a truly nondiscriminatory tax would be one that treated railroads like "other commercial and industrial taxpayers." *Id.* (*citing ACF, McNamara,* and the Ninth Circuit's decision in this case). In *Huddleston,* the court concluded that while most other industrial and commercial taxpayers did not pay the tax, railroads did.

Because the Seventh, Eighth, Ninth, and Tenth Circuits have all consistently applied *ACF's* clear bright-line "general applicability" rule, there is no reason for this Court to revisit that rule.

3. The Other Lower Court Cases Petitioner Relies Upon Were Decided Before *ACF* and Used an Improper Test.

Petitioner's challenge is predicated upon the premise that in enacting the 4-R Act, Congress intended to ensure a nationwide tax policy in which the tax rate of railroads would never be greater than that of their competitors. Under Petitioner's test, the taxation of railroads must be compared to the taxation of those who compete with the railroads for freight traffic. Petitioner's argument fails because all of Petitioner's case authority predates *ACF* and is inconsistent with *ACF's* express holding. Petitioner's proffered test also is inconsistent with the express language of the 4-R Act, which completely removes other transporters from any comparative taxation equations. Moreover, none of Petitioner's cases actually focused on the language of the statute itself, and all of them therefore used the wrong test.

a. The cases that Petitioner relies upon all pre-date *ACF* and are incorrect under the rule that *ACF* established.

Petitioner bases its entire legal challenge upon one district court and two state court opinions issued before this Court's decision in *ACF*.[8] These decisions have no precedential effect because they cannot be reconciled with this Court's decision in *ACF*. Petitioner makes no effort to discuss the effect that *ACF's* "general applicability" test would have upon the result in the three cases. Likewise, Petitioner does not attempt to distinguish the test's application to the facts of this case. Petitioner instead asserts that:

> The majority opinion below misapplied this Court's *ACF Industries* holding to validate the imposition of a nonproperty tax scheme which exempts the railroad's principal competitor.

Pet. at 4. This argument ignores *ACF's* important lesson that "§ 11503, which expresses Congress' resolution of the matter, does not limit the States' discretion to exempt nonrailroad property, but not railroad property, from *ad valorem* property taxes of general application." *ACF*, 114 S. Ct. at 852. While Petitioner may argue for a different test for identifying discrimination, Congress has not chosen to recognize discrimination in every situation in which railroads are treated differently than someone else. Petitioner has failed to identify anything in the 4-R Act's

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[8] *See Atchison, Topeka and Santa Fe Ry. v. Bair*, 338 N.W.2d 338 (Iowa 1983) ("*Bair-II*"); *Burlington N. R.R. v. Triplett*, 682 F. Supp. 443 (D. Minn. 1988); and *Burlington N. R.R. v. Commissioner of Revenue*, 509 N.W.2d 551 (Minn. 1993).

legislative history to establish that Congress considered the taxation of railroads' competitors in creating the Act. More directly, Congress did not enact a statute that required the type of competitor equality that Petitioner seeks. What Congress required is that States must treat railroads the same as they treat a large group of other State taxpayers. As the Ninth Circuit observed:

> The only simple way to prevent tax discrimination against the railroads is to tie their tax fate to the fate of a large and local group of taxpayers.

Pet. App. at 9-10 (*quoting McNamara*, 817 F.2d at 375). Congress sought general equality, not equality measured against one particular group or industry.

b. The three decisions themselves do not have a strong foundation.

The *Bair-II*, *Triplett*, and *Commissioner of Revenue* decisions lack a solid foundation. Although *Bair-II* essentially applied the competitive disadvantage test, no majority favored adopting that test. The single concurring Iowa justice in the 4-1-4 split decision stated that "competitive disadvantage is not a practical standard by which to determine whether a tax is discriminatory. Too many variables are involved to make such comparisons meaningful." *Bair-II*, 338 N.W.2d at 348.[9]

[9] Although the *Bair-II* court used the wrong test, it probably reached the correct result on the merits due to the extreme factual circumstances involved in that case. In *Bair-II*, the Iowa General Assembly enacted a special excise tax on railroads measured by the amount of fuel consumed to propel railway

In the thirteen years since *Bair-II* was decided using the competitive disadvantage test, only two courts – both in Minnesota – have applied that test. The *Triplett* decision is devoid of legal analysis and simply defers to *Bair-II*. The *Commissioner of Revenue* decision, while containing additional analysis, also relies upon the *Bair-II* and *Triplett* decisions. The inconsistency with the holding of these three cases and *ACF* is that the three courts, in applying the competitive disadvantage test, failed to recognize that Congress meant only to place railroads in a position where they would not be singled out for taxation; Congress did not intend to put railroads in a "most favored taxpayer" status. This Court in *ACF* recognized that the railroads could be subject to a tax that exempted various others as long as, overall, the tax was one of general applicability and the railroads were not being singled out for disproportionate taxation.

Congress only meant to require the States to treat the railroads the same as most other industrial and commercial taxpayers in the State, not to give them a preference. *See Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir. 1981); *CSX Transp., Inc. v. Tennessee Bd. of Equalization*, 801 F. Supp. 28 (M.D. Tenn. 1992). Railroads still must "pay their fair share of state taxes." *McNamara*, 817 F.2d at 378.

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vehicles in the State. *Id.* at 341. That tax applied only to the railroads and was therefore easily attacked by the railroads.

c. The plain language of the statute evidences Congress' intent that the taxation of competitors not factor into the discrimination equation.

The most convincing reason to reject the Petitioner's proposed "competitive disadvantage" test in determining discrimination is the language of the 4-R Act itself.[10] The the 4-R Act defines the term "commercial and industrial property," the class that Congress specifically chose to compare the taxation of railroad property to in 49 U.S.C. § 11503(b)(1)-(3), as "property, **other than transportation property** and land used primarily for agricultural purposes or timber growing, devoted to a commercial or

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[10] 49 U.S.C. § 11503 provides as follows:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem tax on rail transportation property at a tax rate that exceeds the tax rate applicable to the commercial and industrial property in the same assessment jurisdiction.
>
> (4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [Interstate Commerce Commission].

industrial use and subject to a property tax levy." 49 U.S.C. § 11503(a)(4) (emphasis added). Thus, a property tax that taxed the railroads and not other transporters would be non-discriminatory under the 4-R Act by the express wording of the statute. Indeed, the express language of the 4-R Act specifically permits differentiation in the taxation of railroad property and other "transportation property" and refutes the use of the competitive disadvantage test. The three decisions Petitioner relies upon never focused upon the words of the statute allowing for this differentiation in taxation among those with transportation property.

The 4-R Act provides for comparison of the taxation of railroads property with that of other "commercial and industrial property," not just the property of railroads' competitors. In fact, Congress defined the class to which railroads may be compared and specifically excluded the railroads' competitors when determining if rate and ratio discrimination existed. It would be illogical for Congress, having allowed for differentiation in taxation between railroads and their competitors in subsections (b)(1)-(3), to nullify its own choice in subsection (b)(4) to ban such difference.[11] Under the express terms of the 4-R Act, there

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[11] This Court rejected a similar argument in *ACF*:

> It would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4). So the Carlines' reading of subsection (b)(4), while plausible when viewed in isolation . . . is untenable in light of § 11503 as a whole.

ACF, 114 S. Ct. at 849.

would be no legally cognizable discrimination even if the railroads were subject to the tax and their competitors were not.

d. The Ninth Circuit correctly found no discrimination because Petitioner was taxed the same as other industrial and commercial taxpayers.

Subsection (b)(4) prohibits a tax that "discriminates against a rail carrier." The Court in *ACF* began its analysis with the question of who the railroads should be compared with in determining if discrimination exists. The Court found that the proper comparative class is commercial and industrial taxpayers in general, and the same conclusion applies here. If the comparison were only between railroads and motor carriers, any "discrimination" could be avoided entirely by taxing both at a rate higher than other commercial or industrial taxpayers. Thus, not only is Petitioner's narrow comparative class argument wrong, but it also ignores the actual unintended consequences that could occur from such a comparison.

Referring to other portions of the 4-R Act (specifically, subsections (b)(1) - (3)), the Court noted that Congress specifically made reference to a comparative class, stating that the comparison was the assessment rate and ratios for the railroads' property against those owned by other commercial and industrial taxpayers. *ACF*, 114 S. Ct. at 848. Subsection (b)(4) is silent as to comparative class. Because Congress chose to analyze the railroads'

tax responsibilities against the broad class of all industrial and commercial taxpayers in the first three subsections of the statute, logic dictates that the same standard be applied in subsection (b)(4).

Two other circuits, in analyzing the propriety of non-property tax challenges under subsection (b)(4), have used this test when comparing the railroads to other industrial and commercial taxpayers. The Fifth Circuit stated:

> We think the best course is to require that the railroads be taxed only under taxes applicable to "other commercial and industrial" taxpayers.

McNamara, 817 F.2d at 375. Similarly, the Seventh Circuit noted:

> By analogy we may assume that a tax is "discriminatory" within the meaning of the fourth subsection if it imposes a proportionately heavier tax on railroading than on other activities. . . .

Burlington N. R.R. v. City of Superior, 932 F.2d 1185, 1187 (7th Cir. 1991). In a property tax case, the Tenth Circuit similarly observed:

> Both subsection (1)(a) and (1)(c) of § 306 establish a comparison class of "commercial and industrial property," and we can think of no sound reason why Congress did not intend the same class to be used in analyzing discrimination under subsection (1)(d).

Huddleston, 94 F.3d at 1417.

Here, the sales and use taxes are generally applicable to more than 146,000 industrial and commercial taxpayers

within the Taxing Authorities' jurisdictions. The proper comparative class for testing discrimination is all other commercial and industrial taxpayers subject to the taxes, and the Fifth, Seventh, Ninth and Tenth Circuits have consistently applied this principle.

* * *

There is no compelling reason for this Court to grant a writ of certiorari. The Ninth Circuit properly applied this Court's recent ruling in *ACF* on the exact statute at issue. No conflict exists between the decision of the Ninth Circuit and the decisions reached by several other circuit courts. The Ninth Circuit, as have the other circuits to decide cases after this Court's decision in *ACF*, applied this Court's clear holding in *ACF* to a case brought under 49 U.S.C. § 11503(b)(4), and under that holding, the Taxing Authorities should prevail.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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